(6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 577

JOE BOMMARITO, ED CARLTON LACY, SAUL KOHN, EDWARD GODDERMAN WEISBERG,
Petitioners

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the final judgment of the Supreme Court of Michigan affirming the conviction of the petitioners in the Recorder's court of Detroit. The judgment of conviction was affirmed in an opinion filed June 5, 1944. A rehearing was denied by the Supreme Court on June 30, 1944.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioners were arrested September 30, 1940 in Detroit and were charged by an information filed January 23, 1942 by the Prosecuting Attorney of Wayne County, Michigan with conspiring to violate the gaming law, Act 328 of the Public Acts of the State of Michigan for the year 1931.

Although the information was not formally divided into counts, it nevertheless contained fourteen separate charges against the petitioners. For the consideration of questions hereinafter raised it will be necessary to enumerate these charges specifically.

They will be hereafter referred to as counts since in the information each is distinctly set forth in a separate paragraph in the nature of a separate count in an indictment. The information itself appears at pages eight to sixteen of the record.

Count one charges the defendants with a conspiracy to violate Act 328 referred to above, and particularly Sections 301, 302, 303, 304, 305, 306, 309 and 372.

Count two charges that the defendants conspired together to receive and accept money on bets.

Count three charges that they conspired to keep and occupy a building and place where gaming was permitted

at 1431 Broadway, 4424 Woodward Avenue, and 129 Selden Avenue, all places situated in the City of Detroit.

Count four charges that the defendants conspired to aid and assist in keeping and occupying the building and places designated.

Count five charges that they conspired for hire and reward to keep and maintain a gaming room at the places designated.

Count six charges that they conspired to aid and assist in keeping and maintaining a gaming room at the places designated.

Count seven charges that they conspired together knowingly to permit the premises mentioned to be occupied for policy and mutuel gambling games.

Count eight charges that they conspired to assist in permitting the premises designated to be used for policy and mutuel gambling games. Count nine charges that they entered into a conspiracy for the purpose and with the intent to keep the places designated for gambling purposes and kept therein apparatus, books, and devices for registering bets.

Count ten charges that they conspired together by means of the publication of papers, pamphlets, notices, and other modes of publication to give information concerning the laying of wagers and bets on races, contests, and games not known by the defendants to be certain.

Count eleven charges that they conspired together to assist and aid in the keeping of the building or places

hereinbefore designated and to maintain therein apparatus, books and devices for the registering of bets.

Count twelve charges that they conspired together for the purpose and with the intent to print and publish information concerning the selling of pools and evidence of betting odds.

Count thirteen charges that they conspired together for the purpose and with the intent to possess policy and pool tickets, slips, checks and memoranda of combination and other bets.

Count fourteen charges that they conspired together for the purpose and with the intent to frequent the places known as 1431 Broadway, 4424 Woodward Avenue, and 129 Selden Avenue.

Each count of the information alleges that the various offenses were committed between the first day of April, A.D. 1936, and the first day of October, A.D. 1940.

The petitioners were brought to trial in the Recorder's Court for the City of Detroit on March 24, 1942. The jury disagreed and they were brought to trial again on November 17, 1942 and found guilty.

A motion for a new trial was made on December 3, 1942 and denied on December 15, 1942. On December 9, 1942 the petitioners were sentenced to not less than one nor more than five years in the State Prison with a recommendation of one year.

The petitioners were then admitted to bail on bonds of two thousand dollars each pending appeal to the Supreme

Court of Michigan. Upon the affirmance of their conviction and denial of a re-hearing, new stays of proceedings were granted by the Supreme Court of Michigan and the bonds of two thousand dollars continued. This stay expires on September 30, 1944 and was given in order that the petitioners might be at liberty pending the filing of this petition.

The petitioners claim that their rights under the federal Constitution were violated in several particulars by the trial court which was thereafter sustained by the Supreme Court. On October 5, 1944, the Michigan Supreme Court executed and filed a certificate in which it set forth the constitutional questions which it considered and decided adversely to the petitioners (R. page 151, 153) These questions will be stated and explained under the following headings.

The First Federal Question

The main evidence of the People against all the petitioners consisted of testimony of the arresting officer and of articles found in a room at 1431 Broadway in Detroit, upon search by police officers, together with certain articles taken from the person of petitioner Kohn and from the car of petitioner Weisberg at the time of arrest on September 30, 1940. The petitioners claim that this evidence should not have been admitted and should have been suppressed by the court on the ground of unlawful entry and illegal search and that refusal to do so was a violation of their rights under the Fourth Amendment, as secured to them by the Fourteenth Amendment.

Had it been suppressed there would have been no case against any of the petitioners. The facts regarding the illegal entry and search appear in the testimony of Sergeant O'Brien of the Detroit police force (it is undisputed), testifying as a witness for the People, and are as follows (R, beginning page 32):

On September 27, 1940 the witness was watching the premises at 1431 Broadway, Detroit. The premises were a music store and it developed later in the testimony that there was a separate room at the back of the store that was entered by a door in the wall separating it from the front room which was the music store.

That night the store was open and the witness was parked in a car at the curb in front of it. At 9:30 he saw petitioners Kohn and Weisberg enter the store carrying a leather bag and a cloth bag like the money bags used in banks. They went into the back room of the store and left at 10:45 carrying nothing with them (R. page 32). Three days later on September 30, 1940 the witness watched the premises from across the street between the hours of 7:30 p.m. and 8:50 p.m. While he was there he saw Kohn and Weisberg leave the store. They were carrying nothing (R. page 33).

The witness returned at 9:15 p.m. with other police officers and watched until 10:40 p.m. At that time the witness saw two men, unknown to him at the time, who later proved to be Lacy and Bommarito, drive up, take a leather bag out of their car and enter the store and go through the door to the room in the rear (R. page 33).

The witness was not in uniform. He followed the two men into the store, which was open for business. The

door to the rear room was closed (R. page 33). The witness went to it and knocked. Somebody said "Who is there?" and the witness mumbled, "It is Eddie." The door opened and the witness entered (R. page 34).

Bommarito was emptying on a table the contents of the bag which consisted of papers and the like used in policy and mutuel gambling. There was also a quantity of money on the table. Lacy was the only other person in the room. The witness arrested the two, counted the money and made a search of the room (R. pages 34 and 35). The witness then went out of the building and saw Kohn and Weisberg standing there on the sidewalk. He arrested and searched them. From the person of Kohn the witness confiscated some gambling paraphernalia. He searched Weisberg's car and confiscated a money bag sealer.

At this point in the testimony the various properties discovered on the search of the room and on the person of Kohn and the car of Weisberg were introduced into evidence as exhibits and the witness testified as to the nature and purpose of this equipment (R. pages 35 to 49 inclusive).

All of the above testimony was objected to as was the admission of the exhibits on the ground of unlawful entry and illegal search (R. pages 34, 35 and 36).

The witness then testified that on the next day, October 1st, 1940, he applied for a search warrant for the premises at 1431 Broadway in order to look into two safes therein. This was objected to (R. page 49 to 52) as was the introduction as exhibits of various properties and papers found in the safes (R. pages 53 through 60, 66 and 67).

On cross examination the witness testified that he did not know Kohn, Weisberg or Lacy on September 27, 1940 (R. page 62). He further said that "Kohn and Weisberg on the night of the 30th were loitering in front of the place, that is all. I did not see them commit any unlawful act that night. I did not see them commit any unlawful act on the night of September 27, 1940. On September 30th I did not see them do anything unlawful. I arrested them purely on suspicion" (R. pages 62 and 63). Further on he stated "I did not see them (Kohn and Weisberg) until the 27th day of September, 1940 * * * I saw them (Lacy and Bommarito) together on September 30, 1940 for the first time * * * All I know about 1431 Broadway is what I saw on the night of September 30, 1940 when I followed Bommarito and Lacy into the rear room" (R. page 63).

With respect to all the testimony just narrated and the exhibits introduced in connection therewith, it is the claim of the petitioners that their admission violated their rights under the Fourth Amendment to the Constitution, in the following respects:

The entry of the witness, Sergeant O'Brien, into the rear room was unlawful in that it was obtained by deceit and stealth; consequently the articles which he found in the ensuing search were not admissible in evidence nor was any testimony concerning such search proper. The original entry being unlawful and the ensuing search illegal, the search warrant obtained the next day was invalid and was an extension of the violation of the constitutional rights commenced the night of the arrest. All of the evidence, whether exhibits or oral, resulting therefrom was inadmissible.

The foregoing relates to Lacy and Bommarito. As to Kohn and Weisberg, their arrest on mere suspicion being unjustified, the ensuing search of their person and Weisberg's car was unlawful. The evidence obtained therefrom was therefore inadmissible.

Without the foregoing evidence the People would have failed to make out a case against the petitioners.

The Second Federal Question

The petitioners did not take the witness stand at their trial. Nevertheless, the People, as part of their case, offered in evidence, over objection of petitioners' counsel, testimony showing a prior conviction of the petitioner Bommarito of a charge of possessing gambling equipment, to which the petitioner pleaded guilty (record pages 71, 72, 73, 74 and 75).

The People offered, and were permitted over objection to produce, testimony showing a prior conviction of the petitioners Edward Godderman Weisberg and Saul Kohn for possession of gambling equipment, a charge to which both petitioners pleaded guilty (R. pages 71, 78, 79).

Another prior conviction of Saul Kohn on the same charge to which he also pleaded guilty was permitted to be shown over objection (R. page 82). It is petitioners' claim that the admission of these three branches of testimony violates the rights of the three named petitioners under the Fifth Amendment of the Constitution of the United States as secured to them by the Fourteenth Amendment, and in particular the following provisions of the Fifth Amendment:

> "• • • nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; • • •"

The People also offered, and were permitted to put in evidence over objection, certain exhibits which were used as evidence in the former convictions just referred to. The exhibits consist of various papers such as mutuel bet slips which were claimed to be the gambling paraphernalia which the petitioners had been formerly convicted of possessing. The exhibit used in testimony concerned with the Bommarito conviction is Exhibit 42 (R. pages 75, 76 and 77). As to the Kohn and Weisberg conviction it was Exhibit 43 (R. pages 79, 80 and 81). As to the former conviction of Kohn alone it was Exhibit 45 (R. pages 82 and 83).

The claim of the petitioners Kohn, Weisberg and Bommarito with respect to the admission of this testimony is the same as that made to the admission of the evidence of their prior convictions; they claim also that it was an appeal to the prejudice of the jury.

The petitioners further claim that the admission of all the foregoing evidence was a denial of due process of law under the Fourteenth Amendment.

In connection with this same federal question, the petitioners raise one other point, namely, the interpretation of a statute of the State of Michigan by the Supreme Court of Michigan in its opinion filed June 5, 1944. One of the grounds of appeal was that the admission of the evidence of the prior convictions of Lacy, Kohn and Weis-

(R. 145)

berg was error since they did not take the witness stand. The opinion of the Court (309 Mich. 139, 144) while admitting the general rule that such testimony is inadmissible, approved its admission here in order to establish a scheme or plan under the authority of Section 17320 of the Compiled Laws of Michigan for 1929. That statutory provision reads as follows:

> "In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

It will be seen that the statute does not purport to make admissible as evidence a prior conviction of a defendant. It refers simply to "like acts or other acts." The Supreme Court of Michigan has now interpreted it to include former convictions as such acts. It is the claim of the petitioners that this interpretation announced for the first time in the opinion of the Court in this case violates the rights of the petitioners against self-incrimination deriving from the Fifth Amendment, as secured to them by the Fourteenth Amendment, and that it likewise violates the due process clause of the Fourteenth Amendment.

The Third Federal Question

This is based on the nature of the information, the details of which have been set forth at the beginning of this section of this petition (Petition, pages 2 to 4; R. pages 8 to 16). The petitioners claim that the information charges fourteen separate conspiracies to commit separate and distinct offenses. The offenses which were the objects of the conspiracies are different, inconsistent and require different kinds of proof. The information does not charge one conspiracy to do several unlawful things but fourteen conspiracies each for a different object.

The petitioners further claim that they should not have been put on trial nor the case submitted to the jury on all fourteen counts.

Before the taking of evidence began, petitioners' counsel moved to quash all the counts in the information except one, for the reasons just stated (R. pages 27 to 30). The motion was denied. Petitioners claim that this ruling as well as the trial and submission of the case to the jury, was a denial of due process under the Fourteenth Amendment of the Constitution.

The Fourth Federal Question

The petitioners claim that in view of the errors complained of under the first three federal questions, their conviction was denial of due process of law and of the equal protection of the laws under the Fourteenth Amendment.

They were not properly and lawfully informed of the charge against them because of the nature of the information which accused them of fourteen separate crimes. They were prejudiced with the jury by the multiplication of charges. Also the jury was confused thereby. Substantially all the evidence in the People's case was improper either because obtained by unlawful search or because it consisted of the proof of former convictions having no probative force in this case. These three groups of errors cover practically the whole case put in by the People. The trial therefore was a mere sham and a denial of due process and equal protection of the laws.

BASIS ON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended (U.S.C.A. Title 28, Section 344 (b)). The specific provisions of the above Section which are relied on are:

> "or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States; * * * or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, * * *"

In only one of the federal questions raised in this petition is a statute of the State of Michigan involved. This is Section 17320, volume 3 of the Compiled Laws of Michigan of 1929, as amended, the full text of which is as follows:

> "In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; nothwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

The date of the judgment sought to be reviewed is June 30, 1944. An order was entered on September 30, 1944, by Mr. Justice Reed extending the time for filing this petition to October 10, 1944. The date of filing this petition is October 10, 1944.

At this point we shall take up the federal questions claimed by the petitioners to be involved, for the purpose of complying with the requirements for jurisdictional statements as stated in Rule 38, par. 2, and elaborated in Rule 12, paragraph 1. The latter rule requires a statement of considerable particularity as to the time and manner of raising the federal questions and the rulings thereon with specific quotations from the record in support.

We had prepared such a statement but in view of the certificate of the Michigan Supreme Court filed on October 5, 1944, and transmitted to this Court as part of the record, we have concluded that under decisions of this Court such a detailed and rather lengthy statement may be dispensed with. In other words, the purpose of the statement is to demonstrate to this Court that federal questions were properly raised so as to give this Court jurisdiction. The decisions we refer to hold, we respectfully submit, that a certificate such as has been filed in this case will properly establish jurisdiction in this Court so far as proper raising of the federal questions is concerned. However, if this Court should be of opinion that a full statement should be furnished, we should like to have an opportunity to do so.

The cases referred to are: *Lisenba v. California*, 314 U. S. 219; 86 L. Ed. 173; *Whitney v. California*, 274 U. S. 357; 71 L. Ed. 1095; *Buchalter v. New York*, 319 U. S. 427; 87 L. Ed. 1492.

The first federal question (Petition, page 5) raised by the petitioners is stated in the certificate of the Michigan Supreme Court as follows (R. page 57):

"1. The rights of the defendants against unlawful and unreasonable searches under the Fourth Amendment to the federal Constitution as guaranteed to them by the Fourteenth Amendment were violated in the following respects:

(a) The entry of the rear room of the premises at 1431 Broadway, Detroit, Michigan, by Sergeant O'Brien of the Detroit police force was unlawful and the ensuing search of the room was illegal.

(b) The search warrant obtained by the said police officer on the basis of the foregoing entry and search was invalid.

(c) The evidence obtained on the original search and on the search warrant should have been suppressed on defendants' motion.

(d) The arrest of Kohn and Weisberg on suspicion was unjustified and the ensuing search of their persons and Weisberg's car was illegal.

(e) The evidence discovered on Kohn's person and in Weisberg's car as a result of such search should have been suppressed on defendants' motion."

Cases believed to sustain jurisdiction are:

1. Entry by the police officer of the premises at 1431 Broadway was unlawful. Entry by deceit or stealth is as unlawful as if made by force and evidence obtained thereby is inadmissible under the Fourth Amendment. *United States v. Mitchneck*, 2 Fed. Supp. 225; *Weeks v. United States*, 232 U. S. 383; 58 L. Ed. 652; *Fraternal Order of Eagles et al. v. United States*, 57 Fed. (2d) 93, 94.

2. A search warrant obtained on the strength of evidence thus secured is invalid and evidence obtained under such a warrant is inadmissible. See the above cited cases.

3. The arrest of Kohn and Weisberg on suspicion was unjustified, any search based thereon was unlawful and evidence obtained thereby was inadmissible under the Fourth Amendment. *Garske v. United States*, 1 Fed. (2d) 620; *United States v. Sam Chin*, 24 Fed. Supp. 14; *United States v. Clark*, 29 Fed. Supp. 138.

The right of citizens to be secured from violation by the State of the Fourth Amendment is guaranteed by the Fourteenth Amendment.

See *Hague v. C.I.O.*, 101 F. (2d) 774, and the same case in 83 L. Ed. 1423; also *Grosjean v. American Press Co.*, 297 U. S. 233; 80 L. Ed. 660.

This question relating to the entry and the searches of the several defendants and the premises, is substantial because the challenged testimony constituted the only evidence offered by the People sufficient to make out a case against the petitioners. Apart from this, practically the only evidence against Kohn and Bommarito was the testimony relating to their former convictions which would have been meaningless in the absence of other proofs. As to Weisberg, there is the same situation regarding a former conviction. As to both Weisberg and Lacy, the People introduced statements made by them after their arrest. Whatever their effect, they would have been inadmissible as well as insufficient to sustain conviction unless the People had first proved the *corpus delecti* of the crime which they could not have done at all without the chal-

lenged testimony and exhibits. This evidence was obtained in clear violation of the petitioners' rights under the Fourth Amendment (it follows that its use violates their rights against self-incrimination under the Fifth Amendment), and was the real and sole basis of their conviction.

The second federal question raised by the petitioners concerns the admission, over objection, of evidence of prior convictions of Bommarito, Kohn and Weisberg together with exhibits which had been used as evidence in those prior convictions. The petitioners claim that this violated their rights against self-incrimination under the Fifth Amendment, as well as the due process clause of the Fourteenth Amendment. One phase of this question involves a statute of the State of Michigan which will be discussed under this heading. Petitioners claim that if the statute makes the reception of evidence of conviction valid, which was the interpretation placed on it by the Supreme Court of Michigan, then it violates the Fifth Amendment, as well as due process. The federal question considered by the Michigan Supreme Court is stated in their certificate as follows (R. page 52):

"2. That the rights of the defendants against self incrimination under the Fifth Amendment as guaranteed to them under the Fourteenth Amendment were violated in the following respects:

> (a) The admission into evidence of proof of the prior convictions respectively of the defendants Bommarito, Kohn and Weisberg for violation of the gambling law.
>
> (b) The admission into evidence, as exhibits, of the same articles and properties used as evidence in the prior convictions of the three named defendants.

3. That the admission of the testimony referred to in Paragraph 2, was a denial of due process of law under the Fourteenth Amendment.

The petitioners' argument is: assuming that the statute properly makes evidence of a prior conviction valid under the circumstances outlined in the statute, nevertheless, to admit such proof in a case not covered by the statute violates the right against self-incrimination given by the Fifth Amendment. In the absence of such a statute, prior convictions cannot be proven and, if permitted, would violate that right. The statute states an exception to the general rule, under our assumption, describing a limited field within which the otherwise prohibited proof is allowed. But the case at bar is not within the terms of the statute. Hence the admission of the challenged testimony violated the Fifth Amendment, and the Fourteenth Amendment's requirement of due process.

The People claimed it was proper to prove the convictions because the petitioners were charged with conspiracy, in other words that these were "like acts" tending to prove "a scheme" on the part of the defendants. (See statute, Petition, page 11). But the proofs showed only individual former crimes of each defendant (except in the one case of Kohn and Weisberg.) The charge in the case at bar was that Bommarito, Kohn, Weisberg and Lacy conspired together. It added nothing to the proof of conspiracy to show that Bommarito or Kohn had been separately arrested on previous separate occasions for possessing gambling equipment, with no connection shown between the two men. If they had been arrested together on the former occasion there might be some merit to the People's position, so far as this argument is concerned. As it was, the challenged proof may have shown that Bom-

marito had been in the gambling business before the charge in this case. But it had no tendency whatever to show that he was in conspiracy with the other petitioners.

The proof therefore was not of the kind permitted by the statute. It was not within the exception. Hence it must be treated as if it had been received by the court in the absence of any statute, in which case, its admission is a violation of the right against self-incrimination and due process. For evidence of a prior conviction is not admissible unless the defendant testifies, in which case he may be questioned about it. The evidence of a former conviction is undoubtedly incriminating. A defendant may not be incriminated by such evidence unless he voluntarily puts himself in the position where he can be. To allow evidence of the conviction to be received without the defendant's taking the stand is to allow the People to do that which they can do properly only if he chooses to waive his right against self-incrimination by testifying. The proof then is admissible only through waiver of the constitutional privilege. If it is permitted to go in without his testifying, there is not merely a violation of the law of evidence; a constitutional right is forthwith violated. In result he is forced to waive the privilege. The violation of the rule of evidence also violates his right against self-incrimination by doing indirectly for him against his will what can only be done lawfully if he himself chooses to do it.

The cases believed to sustain jurisdiction of this court are as follows: *Boyd v. U. S.* 116 U. S. 633; 29 L. Ed. 746; *Counselman v. Hitchcock,* 142 U. S. 562; 35 L. Ed. 1110; In *re Nachman* 114-F995 (D. C. 1902). Rights under the Fifth Amendment are secured by the Fourteenth Amendment against violation by the State. See *Chambers v. Florida,* 309 U. S. 227; 84 L. Ed. 716, note 8; *Hague v. CIO, Supra.*

The question raised is substantial for the reasons stated in discussing the first federal question, namely, that apart from the challenged evidence the People made out no case against the petitioners.

There is also involved here the interpretation by the Michigan Supreme Court of Section 17320 of the Compiled Laws of Michigan for 1929. Briefly and substantially that section permits the proof of "like acts" done by the defendant in a criminal case where his motive, intent or scheme is material. The Supreme Court of Michigan in its opinion, 309 Mich. 139 at 144, construed the words "like acts" to include prior convictions. Petitioners claim that the words "like acts" are so clear taken in context that there is no warrant for such construction; nor is there any necessity for it since if proper, the acts on which the conviction was based could be shown and there is a vast difference in the way of prejudice to the defendant between showing his acts and a conviction for those acts. The construction adopted by the Michigan Supreme Court violates petitioners' rights against self-incrimination and to due process for the reasons stated immediately above in discussing the first phase of this question. The cases believed to sustain jurisdiction, and the ground on which it is contended that the question involved is substantial are also the same.

This specific question involving the statute was not raised either at the trial or on the appeal to the Supreme Court of Michigan because it was not anticipated that the Supreme Court would interpret the statute to make admissible proof of prior conviction, although, of course, objection was made to the admission of this evidence on the grounds set out in the certificate of the Michigan Su-

preme Court. The petitioners there took the position that the statute did not permit such proof. Then the Supreme Court made its holding for which there is no precedent in Michigan. See *Herndon vs. Georgia,* 295 U. S. 441, 79 Law. Ed. 1530 (the principle enunciated in headnote four of the Law. Ed. at page 1533); See also Mr. Justice Cardozo's dissenting opinion at page 1535 of 79 Law. Ed. and cases cited by him.

The third federal question raised by the petitioners is that the information improperly charges fourteen separate conspiracies to commit fourteen separate and distinct offenses, different in their nature and many of them requiring different kinds of proof. The question is thus stated in the certificate of the Supreme Court of Michigan: (R. 152)

"4. That the refusal of the trial court to quash all but one count of the information, the placing of the defendants on trial on all fourteen counts of the information was a denial of due process under the Fourteenth Amendment."

The cases believed to sustain the jurisdiction are as follows: *U. S. v. Potter,* 56 F. 83; *Fontana v. U. S.,* 262 F. 283; *U. S. v. Cruickshank,* 92 U. S. 557; 23 L. Ed. 588. For the provision of the Sixth Amendment that "the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation," is embodied in the concept "due process of law." See *Grosjean v. American Press Co.,* 297 U. S. 233; 80 L. Ed. 660.

The ground on which it is contended the question is substantial is as follows: the petitioners were unable adequately to present a defense since it was not clear on

which of the conflicting charges against them the People would ultimately elect to stand. Secondly, the effect of multiplying the charges in the manner done in the information and of allowing the case to go to the jury on all of the fourteen counts, was to prejudice the petitioners with the jury by making them appear to be charged with fourteen different crimes.

The fourth federal question is stated in the certificate of the Michigan Supreme Court as follows: (R. 152)

"5. That conviction of the defendants in view of the errors above complained of, amounted to a deprivation of their liberty without due process of law, and a denial of equal protection of the laws in violation of the Fourteenth Amendment."

The cases believed to sustain jurisdiction are: *Powell v. Alabama*, 287 U. S. 45; 77 L. Ed. 158; *Twining v. New Jersey*, 211 U. S. 78, 111; 53 L. Ed. 97, 111; *Mooney v. Holohan*, 294 U. S. 112; 79 L. Ed. 794; *Snyder v. Massachusetts*, 291 U. S. 97; 78 L. Ed. 674; *Chambers v. Florida*, *supra*. These cases are to the effect that due process comprehends a fair and just hearing and a full and adequate opportunity for defense.

Petitioners claim that this question is substantial because the errors complained of cover practically the whole trial. The petitioners were tried upon an information which charged them with fourteen separate crimes. Practically the whole body of evidence against them consisted of the challenged testimony. These errors cannot be deemed trivial or non-prejudicial, for, if they are eliminated, there is no case whatever against the petitioners, indeed, if the evidence challenged in our first point were eliminated, there is no case against the petitioners.

QUESTIONS PRESENTED

The questions presented we believe have been fully stated in the immediately preceeding section of the petition and they will not be repeated.

REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI

The reasons relied on are: that a state court has decided federal questions of substance not heretofore determined by this court and has decided them in a way probably not in accord with the applicable decisions of this court.

As to the first, the petitioners claim that there are federal questions of substance involved but so far as they are able to determine there is no decision of this court precisely in point on any one of the four questions. As to the second, despite the above, the holdings challenged in this petition, it is claimed, are contrary to principles enunciated by this court in cases which while not precisely in point are analogous.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Michigan Supreme Court should be granted.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 577

JOE BOMMARITO, ED CARLTON LACY, SAUL KOHN, EDWARD GODDERMAN WEISBERG,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

COUNTER-STATEMENT OF MATTERS INVOLVED

The opinion filed by the Michigan Supreme Court in the instant case, 309 Mich. 139, rather fully sets forth the statement of matters involved. Respondents point out that petitioners' description of the information filed is not absolutely accurate. It charged conspiracy to violate various sub-sections and subdivisions of the State anti-gaming laws, not divided numerically into separate counts, but charged either as one agreement directed towards a series of illegal objects or a series of continuing agreements to that end. All were con-

cerned with violations of Act 328 of the Public Acts of 1931, commonly known as the Michigan Penal Code, and all were found guilty.

FIRST FEDERAL QUESTION

Petitioners claim the right to appeal to this Court, because of the admission of testimony and exhibits procured through searches and seizures conducted at 1431 Broadway in the City of Detroit by officers of the Detroit Police Department. It is respondents' position that this presents no grounds for Federal review. The description of what occurred appears rather fully in the Court's opinion, page 143. We add that the testimony showed a series of three observations by Officer O'Brien, who testified as an expert in the investigation of gambling activities and was then investigating a gambling conspiracy. The opinion of the court giving the reasons for the decision on this point appears, pages 144 and 145, through the first paragraph of 145. Respondents add that the reasonable suspicion of the police officers who were investigating was confirmed by what they saw, that the arrest as the court held was proper, and that under Michigan and other decisions, a search of the persons arrested and the premises to which the officers had access was not only proper but mandatory. *People vs. Cona,* 180 Mich. 641, cited with approval in *People vs. Davis,* 247 Mich. 536; *People vs. Harris,* 300 Mich. 463. Moreover, the search of the safes was by virtue of a search warrant duly obtained.

The record shows no basis of objection to the warrant or the affidavit, other than petitioners' claim that it came after arrest, which is no legal ground for ob-

jection. Petitioners cited and cite no authority for such objection; neither the affidavit nor the warrant are part of the record.

The court's opinion and respondents' additions here are the factual opposition to petitioners' claim under the first federal question.

SECOND FEDERAL QUESTION

Petitioners claim that the admission of the testimony of prior convictions was a violation of their constitutional rights under the Federal Fifth Constitutional Amendment, as secured by the Fourteenth Amendment. At the trial they contended that this was lack of due process. The addition of a claim of violation of the Fifth Amendment is new. That question was not raised in the trial court, nor on the petition for re-hearing after conviction was affirmed. The trial court's position on this subject is embodied in paragraph 2, page 145, of opinion:

> "Appellants also urge that the court erred in admitting evidence as to prior convictions. The general rule is that such testimony is inadmissible to establish the guilt of defendants (fol. 148) as to other distinct and independent crimes, but such testimony is admissible to establish intent. 3 Comp. Laws 1929, Sec. 17320 (Stat. Ann. 28.1050), and authorities cited in *People vs. Hopper*, 274 Mich. 418. Nor was the admission of exhibits used in previous convictions erroneous as showing intent."

Petitioners insist that the state court's interpretation of the statute is in violation of due process. Respondents dispute such averment.

THIRD FEDERAL QUESTION

Petitioners also urge lack of due process in the denial by the trial court of their motion to quash and in the affirmance by the Supreme Court of conviction on all counts. The counts, which were actually not separate counts, but subdivisions of one information charging conspiracy, were neither duplicitous nor inconsistent, bearing in mind that it was not the overt acts, but the agreement which was the essence of the conspiracy. All Michigan decisions hold that the agreement itself is the offense. The Michigan Court here passed upon the question of Michigan pleadings, a matter not believed to be a subject for review in the Federal Court, *United States vs. Hurtado,* 110 U. S. 516, in the absence of lack of due process not here indicated.

FOURTH FEDERAL QUESTION

Under this head, petitioners merely repeat and include the allegations of error set up under the first three alleged federal questions.

ARGUMENT

Jurisdiction

It is the position of respondents that the alleged violation of the Federal Constitution here asserted on the record does not make out a case for review by the United States Supreme Court. Respondents insist that the record presents no basis for assumption of jurisdiction, to review the action of the Michigan Supreme Court.

Jurisdiction is asserted by petitioners under Section 237-b of the Judicial Code, as amended (U. S. C. A. Title 28, Sec. 344 [b]). Here they say is drawn in question the validity of the State statute on the ground of its repugnancy to the Federal Constitution, as well as its alleged repugnancy to the State Constitution. The statute which petitioners assert to be involved is Section 17320, Compiled Laws of Michigan for 1929 (Mich. Stat. Ann. 28.1050), which reads:

> "In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by defendant."

Respondents concede that petitioners freely and repetitiously did claim violations of their constitutional

rights under the Federal Constitution, but deny that any such violations were here involved.

To support their claim of jurisdiction, petitioners cite *Lisenba vs. California,* 314 U. S. 219, 86 L. Ed. 173, wherein the certification of the California Appellate Court affirmatively showed:

> "The decision denying rehearing is to be interpreted and considered as holding against appellant's contention that his rights under the Fourteenth Amendment to the Federal Constitution were violated."

The United States Court accepted that certificate as sufficient to indicate jurisdiction to review some but not all of the asserted phases of lack of due process, notably the allegation that the confession used had been extorted and was involuntary. The State Court was affirmed. However, the Federal Court definitely declined to review the California Court's decision that lack of federal due process was improperly denied by the admission of testimony of prior similar acts.

> "The Federal Constitution requirement of due process is not denied in a prosecution of a husband for the murder of his wife on whose life he had obtained insurance in his favor, by admitting testimony indicating that he had murdered his former wife whose life was also insured in his favor, where the state courts have upheld the relevancy of such testimony."

The decision in the Lisenba case actually upholds the Michigan Supreme Court decision and negatives petitioners' assertion thereunder.

Petitioners likewise in their assertion of jurisdiction cite *Whitney vs. U. S.* 274 U. S. 357, wherein the state

court's certificate of federal questions involved did not appear affirmatively in the record, but the parties stipulated thereto. All that this case does is to show that a court certificate may be based on stipulation instead of upon the record. It does not, however, support any of petitioners' averments of jurisdiction, since it dealt directly only with a lack of due process which rendered unconstitutional a state statute. Petitioners here do not deny the constitutionality of the Michigan statute; they merely object to the court's interpretation of that statute.

Under this head, petitioners' third citation is *Buchalter vs. New York,* 319 U. S. 427, wherein defendants sought certiorari to review state conviction by reason of alleged infringement of federal constitutional rights. The supreme court opinion recited that federal questions were *necessarily* decided. The Supreme Court accepted and reviewed the case on the theory that,

> "The due process clause of thhe Fourteenth Amendment requires that action of a state through any of its agencies must be consistent with the fundamental principles of liberty and justice, which lie at the base of our political institutions, not infrequently designated as the law of the land."

However, the court added:

> "But the amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce the criminal laws under such statutory provisions and common-law doctrines as they deem appropriate and does not permit a person to bring to the test of a decision of this court every ruling made in the course of a trial by a state court."

This case, too, respondents point out, negatives the propriety of the assumption of jurisdiction in the instant case, while the first case cited affirmatively, passes upon the very question raised by petitioners here and rules against him. And the second case merely upholds the supreme court's right to test the constitutionality of the state statute as repugnant to the federal question, a question not here involved.

First Federal Question

The constitutional rights of petitioners under the Fourth Amendment to the Federal Constitution as secured by the Fourteenth Amendment were not here violated. Petitioners assert to the contrary, and cite cases believed to sustain jurisdiction. They assert that Officer O'Brien's entry into 1431 Broadway was by what they call deceit, and the evidence, therefore, inadmissible under the Fourth Amendment. In support of their assertions, they cite cases which involve alleged illegal searches and seizures by federal officers. Because of the fact that these searches are by federal officers, respondents point out that the cases are wholly inapplicable here. All the cases cited by petitioners come under the same head of federal searches. Respondents are particularly interested in petitioners' citation of *Weeks vs. United States,* 232 U. S. 383, 58 L., Ed. 652. There the United States Court reviewed defendant's conviction in a federal court of using the mails to defraud. The question of federal jurisdiction to review state court action was not in question. Defendant asserted, among other claims, violation of his constitutional immunity against unreasonable search and seizure as afforded by the Fourth Amendment. The court found that his rights had been violated. The

case, however, expressly refutes petitioners' contention. We quote syllabus 2:

> "Protection against individual misconduct of police officers not acting under any claim of federal authority, is not afforded by the guarantee of the United States Constitution Fourth Amendment, of immunity from unreasonable searches and seizures. *But the limitations of such amendment reach only the federal government and its agents.*"

This, of course, is directly in point under petitioners' first federal question, and definitely settles the question by showing that it presents no grounds for review.

Under the same head petitioners cite *Fraternal Order of Eagles vs. United States,* 57 Fed. (2d) 93, 94. Again, the search held illegal was conducted by Federal agents, and the case, therefore, fails to sustain petitioners. Respondents add that it has long been well settled that the Fourth Amendment to the National Constitution is a limitation upon federal but not upon state powers. The same is true of the first eight amendments, except in instances where the violation may amount to lack of due process. No federal decision, however, permits review of state search on such ground.

Petitioners go on and object to the evidence obtained by what they claim to have been an invalid search warrant. This, too, is a case for a state, not for federal decision. Moreover, no reason for invalidity was urged by petitioners except their claim that the search warrant was issued after arrest. They present no authority for their claim that this makes a search warrant illegal, and respondents find none. Logically, it is no reason to object, since the search warrant is directed against a place and not against an individual, except incidentally. So that the fact of the individual's arrest

or non-arrest does not affect the right to search granted by the warrant.

That constitutional provisions forbidding unreasonable searches and seizures refer only to the acts of the federal government is now well settled. The cases even go far enough to sustain alleged violation by local officers and permit the use of the testimony in federal cases where the two sets of officers were cooperating. A typical decision to that effect is *United States vs. One Ox-5 American Eagle Airplane,* 38 Fed. (2d) 106; c. f. also *Kitt vs. United States,* 132 Fed. (2d) 920.

Petitioners continue (page 17, Brief) their claim that the rights of citizens to be secured from violation by the State of the Fourth Amendment is guaranteed by the Fourteenth Amendment. This, of course, is refuted by their own citations and the other citations above. They cite also *Hague vs. C. I. O.,* 101 Fed. (2d) 774, 307 U. S. 496, 83 L. Ed. 1423. However, that case too originated in the Federal courts. It was a charge of conspiracy to deprive petitioners of their constitutional rights of free speech, and it was a civil case brought under a specific federal statute authorizing such suits and injunctions. It has no bearing upon the applicability of the Fourteenth Amendment to State decisions concerning the reasonableness of searches and seizures. Petitioners cite also *Grosjean vs. American Press Company,* 297 U. S. 233, 80 L. Ed. 660, which case deals with the power of states and municipalities to enact legislation allegedly contravening the Fourteenth Amendment. That question is not claimed to be here involved.

Second Federal Question

Here petitioners assert the alleged violation of their rights under the Fifth Amendment as secured by the Fourteenth. The question of the violation of the Fifth Amendment was actually not raised in the Michigan courts at all. As petitioners themselves admit (brief, page 21, last paragraph) that while the specific question was not raised either at the trial or on appeal to the Supreme Court, that was "because it was not anticipated that the Supreme Court would interpret the statute to make admissible proof of prior convictions". Petitioners took the position that the statute did not permit such proof. A decision on the matter should have been anticipated. It is their claim that the Supreme Court made its holding that the statute did permit such proof and that such a decision is unprecedented in Michigan. This afterthought of petitioners is clearly an attempt to bring an additional ground of appeal by fitting the subject matter to the case of *Herndon vs. Georgia,* 295 U. S. 441, which they cite.

Petitioners here ask the Supreme Court to assume jurisdiction and overrule the state court's interpretation of the meaning of the Michigan statute. The prior arrests they say were not for similar acts; however, the acts aimed at under the conspiracy charge were exactly similar to those of which defendants had prior conviction, so similar that the tickets, route slips and name slips all bore the notation of the same policy house, that is, the Mexican Villa, so that they were in fact acts under the same type of conspiracy, probably even the same conspiracy, though not within the dates charged in the instant case.

Petitioners argue that evidence of prior conviction is only admissible in case defendants elect to testify.

Respondents concede that under common-law procedure, evidence of other crimes may only be used to *impeach* defendants who take the stand. But that common-law rule is not the same as the rule of evidence as to prior acts to show intent, plan or scheme, which rule of evidence is set up by the statute. That statute is applicable where there is the question of intent as repeated Michigan and other state court decisions show. Unlawful intent is, of course, the essence of the unlawful agreement which constitutes a conspiracy in Michigan. Where the offense is defined either as a lawful agreement to do unlawful acts or an unlawful agreement to do any act. In the instant situation, both agreement and objects were charged to be unlawful, and intent, therefore, most important.

Petitioners assert here for the first time that by the admission of evidence as to prior convictions before defendants took the stand, defendants were compelled to waive their privilege against self-incrimination, and that their rights, therefore, under Amendment Five were violated. This assertion is somewhat of a *non-sequitur*. Under Michigan decisions, and under the wording of the statute, evidence of prior acts is not limited to cases where defendants do testify. It is significant that petitioners offer no authority to support their claim here. Moreover, respondents point out that these petitioners *did not take the stand*, and, therefore, did not waive their rights against self-incrimination, even had their assertion been true. Respondents also add that if we accept petitioners' theory that a defendant is in effect compelled to take the stand by incriminating testimony of this type, it would be logical to add that any damaging testimony showing defendants' guilt would likewise be a violation of his

right against self-incrimination if he asserted his innocence, whether or not he took the stand.

To prove jurisdiction under this head petitioners cite the following cases: *Boyd vs. United States,* 116 U. S. 633; *Counselman vs. Hitchcock,* 142 U. S. 562; *In re Nachman,* 114 Fed. 995. These are all cases arising originally in the federal courts, and none of them present any reason for assumption of jurisdiction over state courts. No state actions are involved in any of the three cases.

Petitioners argue, too, that the Michigan Supreme Court's interpretation of "acts" to include "conviction of acts" should be reviewed. In the absence of the showing of a federal question, respondents do not believe that the United States Supreme Court will review a state court's interpretation of its own statute, not alleged to be unconstitutional. Particularly, since this question was not presented to the state court. Petitioners admit that they made no claim either in the trial or before the appellate court of a violation of their rights under the Fifth Amendment, because they say they did not anticipate the court's unprecedented interpretation of the statute. However, they had before them that interpretation when they filed their petition for a rehearing in the Michigan courts. If the decision did show a violation of such rights, it was certainly the duty of petitioners to present the question first to the Michigan Supreme Court for review. In the *Georgia* case, cited above, the court did not permit review, although the question had not been raised at the trial or on the appeal, as an exception to the general rule, because of the unexpected—and this was really an unexpected decision in that case. However, as soon as the decision came down, the defendants in the *Georgia* case promptly conserved their rights by

presenting the matter first to the Georgia Supreme Court, alleging "violation of constitutional rights." These petitioners had the same opportunity. The *Georgia* case is, therefore, not controlling. In addition to which it cannot truthfully be said that the Michigan Supreme Court's interpretation was either unprecedented or should not have been anticipated.

Third Federal Question

Under this heading petitioners assert denial of due process in the court's refusal to quash "all but one count of the information". Technically there was only one count. Assuming, however, that the fourteen paragraphs are actually separate counts instead of only other phases of the same continuing conspiracy, respondents point out that here, too, the cases cited by petitioners to sustain their claim of jurisdiction fail.

Petitioners cite *U. S. vs. Potter,* 56 Fed. 83. This was a prosecution under a federal check act. The decision was based on the wording of a specific federal statute, which was not followed in the indictment. The case bears no conceivable analogy to the case at bar, even if we were to concede, which we do not, that it is within the purview of the United States Supreme Court to assume jurisdiction over a state appellatet court's interpretation of its own rules of pleadings.

Another of petitioners' citations, *Fontana vs. United States,* 262 Fed. 283, deals with the sufficiency of an indictment in a federal case, attacked and reversed on the score of uncertainty. It, too, offers no precedent for a federal court's review of a state court's interpretation of the sufficiency of state pleadings. Petitioner cites also *Grosjean vs. American Press Company,*

297 U. S. 293, which is not concerned at all with the questions of pleadings as a denial of due process, but with the constitutionality of a particular state statute, sought to be enjoined as unconstitutional. It was held unconstitutional as a denial of the freedom of the press and, therefore, of due process.

The petitioners here complain that the indictment contained conflicting charges, and that it was not clear upon which charge the people would ultimately elect to stand, and that the multiplicity of charges had a prejudicial effect on the jury. Both the trial court and the appellate court held adversely to this contention, saying:

> "But it is also well settled that the people cannot be required to elect between counts where the offenses charged arose out of the same acts at the same time and the same testimony must be relied upon for conviction. *People vs. Warner,* 201 Mich. 547. See, also, *People vs. Marks,* 255 Mich. 271. The various sections of the penal code pertaining to gambling, under which the information is laid, may cover separate offenses, but we are not here concerned with separate offenses, as such, but rather with the identical charge in each count that defendants conspired and agreed together to violate each designated section of the penal code. By detailing each of the conspiracies separately, conviction (fol. 147) might properly follow on any one or all of the counts and result only in the conviction of the crime of conspiracy."

While lack of due process under the Fourteenth Amendment is a limitation which may apply in proper instances to state action, it does not empower a federal court to review the decision of state courts on the propriety of pleadings which are supported by repeated

state decisions, and which do not in fact on their face deprive defendants of due process. Here defendants were charged with conspiracy to do a number of illegal acts all concerned with gambling. It was immaterial whether they actually did any of these acts so long as there was evidence to sustain their agreement to do such acts. Significantly the cases cited under this head do not discuss the claim of petitioners here raised; they are not concerned at all with the alleged lack of due process in state courts.

Fourth Federal Question

Petitioners' discussion under this heading of the Fourth Federal Question is merely a reiteration of the preceding three, reasserting lack of due process and equal protection of the laws as violation of the Fourteenth Amendment. Petitioners cite *Powell vs. Alabama,* 287 U. S. 45, 77 L. Ed. 158, which held that conviction of murder of defendants who were not afforded actual opportunity to be represented by counsel was lack of due process. In that opinion there was discussed the gradual modification of earlier decisions, including specifically the *Hurtado* decision, 110 U. S. 516, which had held sweepingly that the first eight constitutional amendments were not included under the due process clause under the Fourteenth Amendment. Justice Sutherland reviewed the rule and pointed out that while it is generally held to constitutional interpretation, it must yield to more compelling considerations wherever they exist. This had been foreshadowed in the decision in *Twining vs. New Jersey,* 211 U. S. 78, 99. Essentially, the *Powell* decision so far as it discusses the question before us is summed up in syllabus 7, which reads:

> "While the fact that a right is specifically dealt with in another part of the federal constitution may be indicative that it is not embraced within the due process clause of the Fourteenth Amendment, such rule is merely had to construction and must yield to more compelling considerations whenever such considerations exist, as where the right is of such character that it cannot be denied without violating fundamental principles of liberty and justice."

Respondents point out that there are no such compelling considerations before us.

Petitioners also cite *Mooney v. Holohan,* 294 U. S. 112, 79 L. Ed. 794, which held that a conviction obtained by perjured testimony, known to the district attorney to be perjured, is lack of due process, since state courts equally with federal courts are under obligation to guard and enforce every right secured by the federal Constitution. Petitioners cite also *Snyder vs. Massachusetts,* 291 U. S. 97, 78 L. Ed. 674, wherein judgment of conviction of murder was affirmed. Significantly, the court wrote in that decision:

> "A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless it offends some principle of justice ranked as fundamental."

Certainly that description does not apply to the pleadings in the instant case. So, too, *Chambers vs. Florida,* 309 U. S. 227, 84 L. Ed. 716, which held, "due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept."

The rule then is well set up that any type of violation of the Federal Constitution which results in lack or absolute deprivation of due process may be a question to be considered by the United States Supreme

Court, under the theory of the Fourteenth Amendment, which does not mean the United States Supreme Court is willing to assume jurisdiction, and either review or overrule a state court's judgment of its own procedure each time that petitioners dissatisfied by state court action seek such review.

Petitioners claim here that the search was illegal, and that the use of the evidence obtained was illegal in spite of the Michigan statute, and that the Supreme Court's construction of that statute is illegal, or in violation of due process. However, despite the broadening tendency in the interpretation of the due process of the Fourteenth Amendment, petitioners point to no decisions upholding federal review of such questions as are here raised. In particular, they cite no decisions which subject the provisions of the Fourth Amendment forbidding search and seizure to the test of the Fourteenth, nor do they cite decisions so subjecting the Fifth Amendment, even if we assumed that that particular question was properly here raised, which we do not. Neither do petitioners cite any cases which permit review by the federal court of state court's interpretation of its own statute, where the constitutionality of such statute is not raised on the theory of lack of due process.

QUESTIONS PRESENTED

Respondents feel that there are actually no federal questions presented which sustain petitioners' right to review.

In respondents' opinion, the questions petitioners seek to present are more clearly worded as follows:

1 and 2. Will the United States Supreme Court issue a writ of certiorari to review a decision of a state court upholding a search and seizure by state officers as legal?

3. Will the United States Supreme Court review a state court's decision upholding the admissibility of certain evidence made admissible by a state statute?

4. Will the United States Supreme Court review a claim of alleged violation of constitutional rights under the federal constitution, Fifth Amendment, which admittedly was not raised until after the denial of a petition for re-hearing in the state court?

5. Can a state court's interpretation of its own rulings of evidence and pleadings amount to a denial of due process under the Fourteenth Amendment under the circumstances here presented?

To all of the above questions, respondents contend that the answer should be "No".

WHY REASONS RELIED ON BY PETITIONERS FOR ALLOWANCE OF THE WRIT ARE INSUFFICIENT

Petitioners contend that a state court has decided federal questions of substance not heretofore deter-

mined, and decided them in a manner contrary to the decisions of this court. Respondents deny this, deny either that the questions raised are questions of substance, that they are questions over which this court may assume jurisdiction, or that they are questions not heretofore decided. Respondents point out that no one of the federal cases cited by petitioners support the petitioners' theory of a right to review.

RELIEF

Respondents, therefore, respectfully submit that this petition for writ of certiorari to review the judgment of the Michigan Supreme Court in affirming conviction and denying rehearing should be denied.

Respectfully,

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